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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted] 116

STATE OF LOUISIANA ex rel.

FLORENCE M. HOLIFIELD,

Petitioner,

versus

SEWERAGE AND WATER BOARD OF NEW ORLEANS,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA

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SUPREME COURT OF THE UNITED STATES

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No.

STATE OF LOUISIANA ex rel.

FLORENCE M. HOLIFIELD,

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versus

SEWERAGE AND WATER BOARD OF NEW ORLEANS,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA

Petitioner, Florence M. Holifield, prays that a writ of certiorari issue to review the judgment of the Court of Appeal for the Parish of Orleans of the State of Louisiana, entered in the above styled case on January 5, 1959, which the Supreme Court of Louisiana refused to review on March 23, 1959.

CITATION TO OPINION BELOW

The judgment was ready rendered and signed, in the Civil District Court for the Parish of Orleans in case number 363-002, on July 14, 1958. The judgment of the Civil District Court of the Parish of Orleans, State of Louisiana was reviewed by the Court of Appeal for the Parish of Orleans in case number 21,263, and judgment affirming the judgment of the Civil District Court for the Parish of Orleans was entered January 5, 1959. A rehearing was denied by the Court of Appeal for the Parish of Orleans on February 2, 1959. And on March 23, 1959, the Supreme Court of Louisiana, the highest court of the State, refused to review the judgment of the Court of Appeal for the Parish of Orleans in case number 44,506. The opinion of the Court of Appeal for the Parish of Orleans, printed in Appendix A hereto, infra, pp. 25-32 is reported in 108 So. (2d) 277 (1959).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257.

QUESTIONS PRESENTED

1. Where the Sewerage and Water Board of New Orleans, constituted by an Act of the General Assembly of the State of Louisiana which is embedded in the Constitution of the State, and which defines its powers, duties, rights and obligations, arbitrarily refuses to extend the public sewerage system of the City of New Orleans to the property of the petitioner, which property is situated in the

City of New Orleans within the area contemplated by the Act, and conforms to the conditions therein defined, and upon which a special ad valorem tax is levied, to provide for the construction, operation, maintenance, renewal and extension of the public sewerage system throughout the whole city of New Orleans, by the unlawful formulation and application of a policy discriminating against the petitioner and not contemplated by the Act of the General Assembly, does such refusal constitute a denial of due process of law as guaranteed by the 14th Amendment of the Constitution of the United States of America?

2. Where the Sewerage and Water Board of New Orleans is empowered by an Act of the General Assembly of the State of Louisiana, embedded in the Constitution of the State, to fix water rates so calculated to provide revenues, which when added to revenues derived from a special ad valorem tax are to provide sufficient funds for, and are dedicated to, the construction, operation, maintenance, renewal and extension of a public sewerage system throughout the whole City of New Orleans, arbitrarily refuses to extend the public sewerage system to the property of the petitioner, who purchases water at these fixed rates, and whose property is situated in an area of the City of New Orleans contemplated by the Act and is conforming to the conditions therein defined, by the unlawful formulation and application of a policy which discriminates against the petitioner and is not contemplated by the Act of the General Assembly, does such a refusal constitute a denial of due process of law and of equal protection of law as guaranteed by the 14th Amendment of the Constitution of the United States of America?

3. Is the petitioner, who is a property owner in the City of New Orleans, and who pays a special ad valorem tax, and who also purchases water at rates fixed by the Sewerage and Water Board of New Orleans to provide revenues, which when added to the revenues derived from the special ad valorem tax, are dedicated to the construction, operation, maintenance, renewal and extension of a public sewerage system throughout the whole city of New Orleans, and whose property is situated within an area of the City of New Orleans contemplated by the Act of the General Assembly of the State of Louisiana which defines the powers, duties, rights and obligations of the Sewerage and Water Board of New Orleans, and which conforms to the conditions defined therein, entitled to a Writ of Mandamus to compel the Sewerage and Water Board of New Orleans to extend the public sewerage system to her property where the Sewerage and Water Board of New Orleans arbitrarily refuses because the petitioner will not, or cannot, comply with the terms of a policy arbitrarily formulated by the Sewerage and Water Board of New Orleans which discriminates against the petitioner, and which was formulated in violation of, and are in conflict with, the powers, duties, rights and obligations conferred upon the Sewerage and Water Board of New Orleans and defined in the Act of the General Assembly?

4. Is the petitioner, who is a property owner in the City of New Orleans, and who pays a special ad valorem tax and who also purchases water at rates fixed by the Sewerage and Water Board of New Orleans to provide revenues, which when added to the revenues of the special ad valorem tax, are dedicated to the construction, opera-

tion, maintenance, renewal and extension of a public sewerage system throughout the whole City of New Orleans, and whose property is situated within an area of the City of New Orleans contemplated by the Act of the General Assembly of the State of Louisiana, which defines the powers, duties, rights and obligations of the Sewerage and Water Board of New Orleans, and which conforms to the conditions defined therein, entitled to a Writ of Mandamus to compel the Sewerage and Water Board of New Orleans, to extend the public sewerage system to the petitioner's property, where the Sewerage and Water Board of New Orleans arbitrarily refuses to extend the public sewerage system by the unlawful formulation and application of policies which discriminate against the petitioner, and which are not contemplated in the Act of the General Assembly, while it, the Sewerage and Water Board of New Orleans has expended public funds for the construction of an extension of the public sewerage system under conditions which are not contemplated in the Act?

STATUTES INVOLVED

The following laws of the United States of America are involved:

> Section 1, 14th Amendment to the Constitution of the United States. (reprinted in Appendix B, infra p. 34)

The following laws of the State of Louisiana are involved:

> Miscellaneous Amendments to the Constitution of 1898.

Article 14, Section 23 and Section 23.1 of the Constitution of the State of Louisiana of 1921.

Section 33, Act No. 6, Extra Session of the General Assembly of 1899.

Section 33, Act No. 6, General Assembly of 1902.

Section 8, Act No. 262, General Assembly of 1952.

Volume 5, Louisiana Revised Statutes of 1950.

Volume 20, West's Louisiana Revised Statutes of 1950, Annotated.

Section 4092, Title 33, Chapter 9, Louisiana Revised Statutes of 1950, as amended. (Pertinent portions of the above laws are reprinted in Appendix C, infra pp. 35 through 42).

STATEMENT

Petitioner, Florence M. Holifield, the owner of real property within the City of New Orleans, State of Louisiana, designated by municipal number 6742 Pontchartrain Boulevard, instituted a suit against the Sewerage and Water Board of New Orleans in the Civil District Court for the Parish of Orleans on June 14, 1958, to obtain a Writ of Mandamus to compel the Board to extend the public sewerage system of the City of New Orleans to her property. Petitioner insists that she is entitled to have the public sewerage system extended to her property as matter of law and that the Board's refusal to extend the public sewerage system constitutes an act so arbitrary, capricious and discriminatory as to be a denial of due proces of law

and a denial of equal protection of law as guaranteed by the 14th Amendment to the Constitution of the United States of America.

In due course the Sewerage and Water Board of New Orleans filed an answer in which it denied the existence of any law imposing a duty upon it and denied that it had acted arbitrary, capricious and discriminating.

The case was tried and judgment was rendered, read and signed on July 14, 1958. The judgment for the defendant refused to grant the Writ of Mandamus which petitioner sought.

On July 16, 1958, petitioner filed a petition for a suspensive and devolutive appeal from the adverse judgment. On July 18, 1958, petitioner filed an appeal bond in the amount f One Hundred Dollars as determined by the Civil District Court for the Parish of Orleans.

On August 13, 1958, petitioner filed a motion for an extension of time to complete the transcript and a affidavit of the Deputy Clerk of Court for the Civil District Court for the Parish of Orleans attesting to the fact that the delay was due to the failure of the Court Reporter to transcribe the testimony within the prescribed time, in the Court of Appeal for the Parish of Orleans. The motion was granted. The transcript was lodged in the Court of Appeal for the Parish of Orleans October 21, 1958. On December 1, 1958, petitioner filed a written brief in support of her motion for an appeal and on December 12, 1958, the Sewerage and Water Board of New Orleans filed a

written brief. A hearing was had before two of the three judges of the Court of Appeal for the Parish of Orleans and on January 5, 1959, the Court of Appeal for the Parish of Orleans affirmed the judgment of the Civil District Court for the Parish of Orleans. On January 20, 1959, petitioner filed an application for a rehearing before the Court of Appeal for the Parish of Orleans and on February 2, 1959, the rehearing was denied.

The petitioner filed a written notice with the Court of Appeal for the Parish of Orleans of her intention to apply to the Supreme Court of Louisiana for a Writ of Certiorari and Review. On February 25, 1959, petitioner filed an application for a Writ of Certiorari and Review which the Supreme Court of Louisiana refused to issue on March 23, 1959, for reasons that they found no error of law.

The petitioner now applies to this Honorable Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Parish of Orleans which the Supreme Court of Louisiana, the highest court of the State of Louisiana, refused to review.

REASONS FOR GRANTING THE WRIT

The petitioner's position, simply stated, is as follows:

(1) That as a property owner in the City of New Orleans she pays a special ad valorem tax of 2 mills on the dollar on all of her property, real, personal and mixed, in the City of New Orleans, which special tax is levied and collected under the authority of an amendment to the Con-

stitution of the State of Louisiana of 1921, Article 14, Section 23.1; and,

(2) That as a resident of the City of New Orleans, maintaining her residence and domicile at this property identified as 6742 Pontchartrain Boulevard, she purchases water from the Sewerage and Water Board of New Orleans and pays for this water at rates, which under the authority vested in the Board under the provisions of Act No. 6, Extra Session of the General Assembly of 1899, which was ratified and approved by the amendment to the Constitution of the State of Louisiana of 1898,[1] and Article 14, Section 23 of the Constitution of the State of Louisiana of 1921,[2] the Board is empowered to fix so calculated as to produce revenues, which when added to the proceeds of the special ad valorem tax, produce a total revenue[3] deemed sufficient to construct, maintain, renew, extend and operate an otherwise free public sewerage system throughout the whole city of New Orleans; and,

(3) That this Act No. 6, Extra Session of the General Assembly of 1899, as amended, constituted and established the Sewerage and Water Board of New Orleans and defined its powers, duties, rights and obligations; and,

(4) That the unde provisions of Section 33, Act No. 6, Extra Session of the General Assembly of 1899, as

[1]See Miscellaneous Amendments to Constitution of 1898, reprinted in Appendix "C," infra p. 38 which was interpreted in State ex rel. Saunders v. Kohnke, 33 So. 793, 109 La. 838 (1903), and which held that "by the ratification and adoption the entire act, including the reserved right of the Legislature to amend was anchored in the Constitution." (sic)

[2]See Article 14, Section 23, reprinted in Appendix "C," infra pp. 35-36.

[3]Section 24.2 to 24.11 of Article 14 of the Constitution of 1921 provide for the issuance of public bonds based on ad valorem tax.

amended, the powers, duties, rights and obligations of the Sewerage and Water Board of New Orleans for the extension of the public sewerage system in the City of New Orleans, in-so-far as the time and place factors are concerned, are defined; and,

(5) That the petitioner's property is situated within the area of the "whole city" of New Orleans as contemplated by the provisions of Section 33, Act No. 6, Extra Session of the General Assembly of 1899, as amended, and it conforms to the conditions defined therein; and,

(6) That under the provisions of Section 33, Act No. 6, Extra Session of the General Assembly of 1899, as amended, it is the duty of the Sewerage and Water Board of New Orleans to extend the public sewerage system to the property of the petitioner; and

(7) That the Sewerage and Water Board of New Orleans refuses to perform its duty under the provisions of Section 33, Act No. 6, Extra Session of the General Assembly of 1899, as amended; that the Board has assumed powers not delegated to it by the General Assembly and not conferred upon it by the Act, as amended; that the Board unlawfully adopted policies which discriminate against the petitioner; that, by the application of these policies, the Board refuses to extend the public sewerage system to the petitioner's property and has expended public funds under conditions not contemplated by the Act; and,

(8) That these arbitrary acts of the Sewerage and Water Board of New Orleans which discriminate against

the petitioner result in the petitioner being deprived of her property right in the public sewerage system without due process of law and without equal protection of law guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States.

DUTY TO EXTEND PUBLIC SEWERAGE SYSTEM

The Courts of the State of Louisiana, although they have been called upon on numerous occasions to render a judicial interpretation and construction of Act No. 6, Extra Session of the General Assembly of 1899, as amended,[1] have never been called upon to interpret or enforce the provisions of Section 33 of the Act. The Court of Appeal for the Parish of Orleans, affirming the judgment of the Civil District Court for the Parish of Orleans, which judgment the Supreme Court of Louisiana refused to review, avoided the real issues raised by the petitioner. These issues, therefore, have never been decided, and the petitioner relies on the following interpretation and construction of Section 33 of the Act.

Section 33, Act No. 6, Extra Session of the General Assembly of 1899.

"Be it further enacted, etc., That the contracts for the above works shall be let in such a manner as to cover the whole city; * * *, at the same time, and shall be prosecuted in such a manner that they shall be completed througout the city, * * * as far as possible at the same time.

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[1] State ex rel. Saunders v. Kohnke, 33 So. 793, 109 La. 838 (1903); State ex rel. Porterie v. Walmsley, 162 So. 826, 183 La. 139 (1935); State v. Billhartz, 84 So. 120, 146 La. 855 (1920); State ex rel. Bailey v. Sewerage and Water Board, 102 So. (2d) 879 (1958) and others.

> The words 'whole city'[2] as used in this section shall not be construed to mean the whole parish of Orleans, but to mean, as understood by the voters who voted this special tax, that inhabited portions of the city now divided into squares and lots where the streets are opened and in use as such, *or whenever hereafter opened and in use.*" (italics mine)

From a reading of this Act it becomes evident that its function is twofold. Its first office was to insure the uniform construction of the public systems, including the public sewerage system, throughout the entire inhabited portions of the city divided into squares and lots where the streets were opened and in use as such in the then existing "whole city" of New Orleans. Its second office, determined by the language which is italicized, was to establish a permanent policy for the extension of the public systems, including the public sewerage system, in-so-far as the *time* and *place* factors were concerned.

Petitioner contends that the only interpretation which can be given to this section of the Act without doing violence to the very language contained therein and without distorting the intention of the General Assembly is that it becomes obligatory upon the Sewerage and Water Board of New Orleans to extend the public sewerage, drainage and water systems into previously undeveloped areas, when:

(1) Those areas have been divided into squares and lots; and

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[2]A definition of the term "whole city" was necessary due to the anomalous situation whereby the geographical boundaries of the Parish of Orleans and the political boundaries of the City of New Orleans are identical but where the area encompassed by the cosmopolitan development of the City of New Orleans occupies but a fraction of the whole area and the remainder is rural in character.

(2) The streets, created by the dividing of those areas into squares and lots, are opened and in use as such,

and limited the expenditure of the public fund for the extension of the public sewerage and drainage and water systems by the Sewerage and Water Board of New Orleans to those conditions exclusively.

Petition further contends that Section 33, Act No. 6, Extra Session of the General Assmbely of 1899, as above interpreted, has been the law of the State of Louisiana since the date of its original enactment and although she acknowledges that certain acts of the subsequent General Assemblies appear to change its meaning no change has been accomplished which in any way modifies Section 33 in-so-far as it has established a permanent policy defining WHERE AND WHEN the Sewerage and Water Board of New Orleans shall be duty bound to extend the public sewerage system.

The first modification of Section 33, Act No. 6, Extra Session of the General Assembly of 1899 was the enactment of Act No. 111 by the General Assembly of 1902.[1] This Act substituted the words "sewerage and water systems" for the words "above works" and then proceeded to track the language of Section 33, Act No. 6 of 1899, verbatim. The only change intended was to limit the application of the policy established by Section 33, Act No. 6 of 1899 for the extension of the public system was to exclude its applicability to the public drainage system. That issue is not raised here.

[1]See excerpts of preamble of Act No. 111 and Section 33 of Act No. 111, General Assembly of 1902, reprinted in Appendix, infra pp. 40-41.

Then in 1950, the Extraordinary Session of the General Assembly enacted Act No. 2, and thereby established the Louisiana Revised Statutes of 1950, which is a codification of the prevailing Acts of the past General Assemblies of the State of Louisiana and a modernization of the Revised Statutes of 1870. When the redactors codified the provisions of Act No. 6, Extra Session of the General Assembly of 1899, as amended, in Title 33, Chapter 9, Section 4071 through 4091, Volume 3, Louisiana Revised Statutes of 1950, Section 33 of the Act was omitted. An explanation of this omission appears in Volume 20, Page 481, West's Louisiana Revised Statutes of 1950, Annotated. The function of Section 33 of the Act, it was believed, had been executed. This omission, however, does not affect the efficaciousness of Section 33 of Act 6, Extra Session of the General Assembly of 1899, as amended, because by its ratification and approval by the adoption of the Miscellaneous Amendment to the Constitution of 1898

> "* * * the act of 1899 became incorporated into the Constitution, including the reserved right of the Legislature to amend; * * *"
>
> State ex rel. Saunders v. Kohnke, 33 So. 793, 109 La. 838 (1903)

and although the Legislature had the power to amend the provisions of the Constitution of the State of Louisiana its power to amend was limited:

> "It is no doubt true that, ordinarily, the General Assembly may, by an independent statute, repeal, abrogate, or, in effect, amend pre-existing legislation, the later statute, in such case, be-

coming the law, in the event of conflict, as the last expression of legislative will; but the case here presented is not an ordinary case. The general and fundamental rule is that no provision, no language, of the Constitution, can be altered by mere legislative enactment, and we have here the remarkable exception to that rule, where the Constitution itself declares that a certain provision may be changed, subject to specified condition, not, by miscellaneous legislation in conflict therewith, but by amendment."

State v. Billhartz, 84 So. 120, 146 La. 855 (1920)[2]

and of course Act No. 2, Extraordinary Session of the General Assmebly of 1950 did not contemplate any amendment to existing Acts of the past General Assemblies but merely a revision for and a codification thereof.[1]

This argument is further supported by the fact that that portion of Volume 5, Louisiana Revised Statutes of 1950, devoted to the listing of Acts of the General Assembly repealed by the Revised Statutes of 1950 does not list Section 33, Act No. 6, Extra Session of the General Assembly of 1899 as one of the Acts repealed.

Then in 1952 the General Assembly of the State of Louisiana enacted Act No. 262, which amended and reenacted Section 4078, 4081 through 4085 and 4089, and *added* section 4092 of Title 33, Chapter 9, of the Louisiana Revised Statutes of 1950.

[1]See Act No. 2, Extraordinary Session of the General Assembly of 1950 reprinted in Appendix C, infra p. 42.

[2]Page 889.

Section 8, Act 262, General Assembly of 1952.

"That Section 4092 be added to Title 33, Chapter 9, of the Louisiana Revised Statutes of 1950, which said new section was formerly Section 33 of Act 6 of 1899, Extra Session, as amended, is hereby adopted to read as follows:

Section 4092. The extension of the sewerage, water and drainage systems shall be made, as far as practicable, in areas adjacent to inhabited portions of the City, divided into squares and lots, and where dedicated streets are open and in use as such, or wherever here after opened, dedicated and in use.[1]

If the language of the Act of 1952 properly reveals the intent of the General Assembly, then Section 4092, Title 33, Chapter 9, is merely added to the Louisiana Revised Statutes of 1950 as it had originally been enacted in Section 33, Act No. 6, Extra Session of the General Assembly of 1899, and as amended by Section 33, Act No. 111, General Assembly of 1902, and it is not further amended.

If the General Assembly intended to further amend Section 33, Act No. 6, Extra Session of the General Assembly of 1899, as amended by Section 33, Act No. 111, General Assembly of 1902, and then add it to the Louisiana Revised Statutes of 1950, that intent is not revealed in the language of the Act itself. The Act of 1952, not being an amendment to Section 33, Act No. 6, Extra Session of the General Assembly of 1899, as amended by Section 33, Act No. 111, General Assembly of 1902, is only a legislative

[1]The re-enactment of Section 33 in Section 4092, Title 33, Chapter 9, LRS of 1950, whether operative or not, reveals Legislative admission of two-fold office of Section 33 and error of redactors of LRS of 1950 in concluding purpose of Section 33 had been executed.

enactment which is in conflict with the provisions of the Constitution of the State of Louisiana of 1921, and, under the rule announced by the Supreme Court of Louisiana in the Bilhartz case, it has no affect. It is therefore null and void.

Relying on the provisions of Section 33, Act No. 6, Extra Session of 1899, as amended by Section 33, Act No. 111, 1902,[2] as the prevailing law, petitioner contends that the General Assembly has imposed a ministerial duty upon the Sewerage and Water Board of New Orleans to extend the public sewerage system into previously undeveloped areas, when:

(1) Those areas have been divided into squares and lots; and

(2) The streets, created by the dividing of those areas into squares and lots, are opened and in use as such,

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[2]If Section 4092, Title 33, Chapter 9, of the Louisiana Revised Statutes of 1950, does in fact amend Section 33, Act No. 6, Extra Session of 1899, as amended by Section 33, Act No. 111 of 1902, then petitioner contends that the only change that it makes is to confer upon the Sewerage and Water Board of New Orleans a duty to extend is public sewerage system under the same conditions as those imposed by Section 33 of Act No. 6, subject to the exercise of a limited judgment or discretion to determine the practicability. Petitioner contends that even under the provisions of Section 4092, Title 33, Chapter 9, of the Louisiana Revised Statutes of 1950, the acts of the Sewerage and Water Board of New Orleans, herein described are so arbitrary, capricious and discriminatory as to deprive the petitioner of her property right in the public sewerage system without due process of law and without equal protection of law as guaranteed in Section 1, of the 14th Amendment to the Constitution of the United States. If Sec. 4092, LRS of 1950, enables the S&WB to deny an extension of the public sewerage system to the petitioner's property as it has in this instance, then petitioner urges that Sec. 8, Act 262 of 1952, attempts to change the purpose of the taxpayers' petition of 1899 which the Legislature is powerless to do under the doctrine of the Kohnke and Walmsley case; further, that the Act is unconstitutional in that it deprives the petitioner of her property right in the public sewerage system without due process of law and without equal protection of law as guaranteed by Sec. 1, 14th Amendment to the Constitution of the United States.

and

> "Mandamus is a proper remedy to compel performance of municipal officers and board of duties imposed upon them by law."

State ex rel. Gray v. City of Alexandria, 12 So. (2d) 25 (1942);

State ex rel. Averill v. Cooper, 48 So. (2d) 163 (1949);

State ex rel. Nunez v. Baynard, 15 So. (2d) 649, 203 La. 711 (1943);

Dupuy v. Jones, 15 So. (2d) 528 (1943).

That this duty imposed upon the Sewerage and Water Board of New Orleans did not involve the exercise of judgment or discretion but merely the determination of a fact, and, a proper construction of the law:

> "Where duty of a public official is fixed by law and its performance is made mandatory on him, he can be compelled by mandamus to perform that duty, even though statute may require, in some degree, a construction of the law and the determination of a question of fact as to whether the duty is to be performed."

Dupuy v. Jones, 15 So. (2d) 528 (1943);

State ex rel. Saint v. Toups, 95 So. (2d) 55, 227 La. 290 (1957).

The record in this case is replete with testimony to the effect that at the time the petitioner filed her suit her property was within the area of the "whole city" of New

Orleans as contemplated by Section 33, Act No. 6, Extra Session of the General Assembly of 1899, as amended, and that the area was divided into squares and lots and that the streets were opened and in use as such. Further the testimony of the petitioner (R-90), which was admitted by Mr. Edmund F. Hughes, General Superintendent of the Sewerage and Water Board of New Orleans, (R-103) shows that this area has been so subdivided FOR OVER THIRTY YEARS.

The petitioner's property being within the "whole city" of New Orleans as contemplated by Section 33, Act No. 6, Extra Session of the General Assembly of 1899, as amended, and conforming with the terms therein defined is eligible for the services of the public sewerage system and it is the duty of the Sewerage and Water Board to extend the public sewerage system to the petitioner's property.

The Sewerage and Water Board of New Orleans, disregarding the duty imposed upon it under the provisions of Section 33, Act No. 6, Extra Session of the General Assembly of 1899, as amended, refuses to extend the public sewerage system to the property of the petitioner unless she, in conjunction with 80% of other property owners, in some vaguely defined area of which her property is a part, pays unto the Sewerage and Water Board an unlawful assessment of $2.00 per front foot levied by the Sewerage and Water Board of New Orleans a pro rata cost of the construction which the Sewerage and Water Board of New Orleans, unblushingly, refers to as a "voluntary contribution."

While refusing to extend the public sewerage system

because the petitioner cannot, or will not, comply with the terms of the Sewerage and Water Board of New Orleans the Board continues to construct and extend its sewerage system into other sections of the "whole city" of New Orleans without subjecting property owners to pay a pro rata of the cost of construction or to act in concert with other property owners (R-103). In addition the Sewerage and Water Board of New Orleans has expended the public funds for the extension of the public sewerage system to encourage development of area not subdivided into squares and lots to aid private contractors who were anxious to develop new subdivisions for personal profit (R-83, 84).

There exists absolutely no authority for the Sewerage and Water Board of New Orleans to classify certain areas within the "whole city" of New Orleans eligible for the construction of extension of the public sewerage system only when the property owners pay a pro rata of the construction costs.

> "It appears abundantly clear from the provisions of both the Constitution of 1898 and 1921 that the Sewerage & Water Board would construct, operate, maintain, renew and extend the public water, drainage and sewerage system with funds derived from but four sources * * * It was never intended that the Sewerage and Water Board would exact from property owners a pro rata of the costs of constructing or extending the sewerage system." * * *
>
> "the need for funds cannot serve as a legal basis for the adoption of the rule under which the property owners in outlying sections of the City are

required to contribute to the costs of installing the sewerage mains servicing their property."

State ex rel. Bailey v. Sewerage and Water Board, 102 So. (2d) 879 (1958).

CONCLUSION

The petitioner pays a special ad valorem tax levied and collected under the authority of Article 14, Section 23.1 of the Constitution of the State of Louisiana of 1921 (R 93).

"Special assessments for local improvements can be justified only on the theory of special benefits accruing to the property assessed."

Morton Salt Company v. City of South Hutchinson, C.C.A. Kan., 159 F. (2d) 897 (1947);
Oregon Short Line R. Co. v. Clark County Highway Dist., D.C. Idaho, 22 F. (2d) 681 (1927);
Orr v. Allen, D.C. Ohio, 245 F. 486, affirmed 39 S.Ct. 23, 248 U.S. 35, 63 L. Ed. 109 (1918).

Her property is situated within the "whole city" of New Orleans as defined by Section 33, Act No. 6, Extra Session of the General Assembly of 1899, as amended, and it conforms to the conditions therein defined, therefore, the duty devolves upon the Sewerage and Water Board of New Orleans to extend the public sewerage system to the property of the petitioner and to pay all costs in connection with the construction of the extension out of the public

fund derived, in part, from the proceeds of the special ad valorem tax to which the petitioner is subjected.

> "* * * due process of law is denied where the improvement district includes, or assessments are levied on, lands which are not benefitted * * *"
>
> Duncan v. St. John Levee & Drainage Dist., C.C.A. Mo., 69 F. (2d) 342 (1934).
>
> Carolina & N.W. Ry. Co. v. Town of Clover, S.C., C.C.A.S.C., 46 F. (2d) 395 (1931).

The Sewerage and Water Board of New Orleans refuses to extend the public sewerage system to the property of your petitioner. This refusal has been accomplished by the assumption of powers not conferred upon the Board, which are tantamount to the usurpation of the legislative powers of the General Assembly, and the arbitrary formulation of a policy, the application of which, discriminately excluded the petitioner's property from the "whole city" of New Orleans for the purposes of enjoying the benefits of a public sewerage system to which she is entitled as a matter of law and of right. By the arbitrary application of this discriminating policy unlawfully formulated by the Sewerage and Water Board of New Orleans, the Board has deprived the petitioner of her property right in the use of the public sewerage system without due process of law and has subjected her to this loss discriminatorily without equal protection of the law as guaranteed by Section 1, 14th Amendment to the Constitution of the United States.

> "The want of due process may arise either from the fact that the law attempted to be enforced is

void or that the forms of law have not been observed."

Cook v. Parkinson, 131 P. (2d) 82, 191 Okl. 529 (1942);

Crosbyton-Southplains R. Co. v. State R. Commn., Civ. App. 169 SW 1038 (1914).

"the 14th Amendment covers the unequal enforcement of valid laws as well as any enforcement of invalid laws."

East Coast Lumber Terminal v. Town of Babylon, C.A.N.Y., 174 F. (2d) 106, 8 A.L.R. (2d) 1219 (1949);

Oney v. Oklahoma City, C.C.A. Okl., 120 F. (2d) 861 (1941).

Respectfully submitted,

JAMES B. O'NEILL,
Attorney for Petitioner,
810 Maritime Building,
New Orleans, La.

PROOF OF SERVICE

I, James B. O'Neill, the attorney for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on George Piazza, Esq., General Counsel for the Sewerage and Water Board of New Orleans, by mailing a copy thereof, "postage

prepaid" to his office, Room 1807 Pere Marquette Building, New Orleans, Louisiana.

June 5, 1959
New Orleans, La.

JAMES B. O'NEILL,
Attorney for Petitioner,
810 Maritime Building,
New Orleans, Louisiana

APPENDIX A

State of Louisiana ex rel. Florence M. Holifield	: NO. 21263
v.	: COURT OF APPEAL
	: PARISH OF ORLEANS
Sewerage & Water Board of New Orleans	: STATE OF LOUISIANA

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIV. "C" — NO. 363-002
HON. LOUIS H. YARRUT, JUDGE

GODFREY Z. REGAN
JUDGE

McBRIDE, J. ABSENT

COURT COMPOSED OF JUDGES GEORGE JANVIER AND GODFREY Z. REGAN

James B. O'Neill for relator and appellant
George Piazza for defendant and appellee

AFFIRMED

Plaintiff, Mrs. Florence M. Holifield, as the owner of property designated by the municipal number 6742 Pontchartrain Boulevard, instituted this suit against the defendant, Sewerage & Water Board of New Orleans, endeavoring to obtain a writ of mandamus compelling it to extend sewer facilities from the intersection of 38th Street and

Avenue C to her property, a distance of 960 feet, and insists that the defendant's refusal to extend its facilities to her property is an arbitrary, capricious, and discriminatory act on its part.

Defendant pleaded the exceptions of no cause or right of action, which were disposed of, and then answered, asserting in substance that there exists no law which entitles the plaintiff to the relief prayed for; that she is 1900 feet removed from the sewer main and there are only seven intervening residences between that main and her home and it would cost approximately $21,000.00 to extend sewerage to her property; and finally that its refusal to extend its facilities to her property is not an arbitrary, capricious, or discriminatory act.

From a judgment in favor of defendant, dismissing plaintiff's suit, she has prosecuted this appeal.

The trial judge made a thorough analysis of this case in his written reasons for judgment, which in our opinion fully encompasses the subject posed for our consideration and the result which we have agreed should be reached:

> "Plaintiff seeks a mandamus to compel the defendant to lay 1900 feet of sewer pipe, at a cost of approximately $21,000.00, merely to serve her two lots of ground, located in Square 71, bounded by West End Shell Road, 38th Street, Avenue 'A' and 40th Street, designed as Lots 13 and 14 in Metairie Park Subdivision, measuring each 25 feet front.
>
> "Defendant contends it would be guilty of

misuse of public funds if it spent $21,000.00 merely to serve plaintiff. Plaintiff bought her lots in 1950, at which time and since the area was and is primitive and undeveloped. Act 6 of 1899, Extra Session, indicates that sewerage service should be given to the built-up sections of the City. New extensions stem from the location of the nearest sewer or water main to the adjacent area, and the Board should have discretion to determine what areas on the outskirts of the City and long distances from the location of sewer or water mains should first be served; and further contend that the finances of the Board at this time are in such conditon that it could not, even if it wanted to, take care of all the demands that come from the fringe or semi-built up areas, for sewerage and water connections.

"Clifford Morvant, C.P.A., and auditor for defendant, testified that all funds now available, plus all funds contemplated from all sources, including the year 1962, will amount to $55,028,000.00. This amount includes $19,000,000.00 of Water Revenue Bonds, authority for issuance thereof having been passed by the 1958 Legislature, and to be voted upon by the people in November, 1958. Also included is the surplus of water revenues, after deducting the operating expenses; surplus from millage of collections, net after expenditures for normal extensions and replacements; ad valorem bond proceeds of the City of New Orleans; all reserve funds, and all odds and ends that constitute revenue of the Board; that for the years 1958 through 1962, the Board will expend to carry out its Five-Year Capital Improvements Program, the sum of $56,225.500.00, thus leaving a deficit of $1,197,500.00.

"The program for sewerage extensions during the years 1958 through 1962, both inclusive, shows that $13,060,000.00 will be expended throughout the City. Of that amount, $1,000,000.000 is to be expended on the sewer system west of Pontchartrain Boulevard, known as Pontchartrain Pioneers Section, the area involved in this case.

"It is hoped that the $1,000,000.00, plus contributions to be made by the property owners, estimated at $250,000.00, will give sewer service to every square and lot in Metairie Park Subdivision.

"The Five-Year Capital Program does not give the City of New Orleans all of the basic needs that will be required for the next twenty years, in accordance with the exhaustive research made by nationally known consulting engineers, Black & Veatch, Kansas City, Missouri, who estimated that it would cost $182,000,000.00 to carry out the capital Improvements necessary for the proper growth and proper service to the people of New Orleans. The capital program adopted by defendant, amounting to approximately $58,000,000.00, to be expended within the next five years, is a bob-tailed program, included in which are only those projects where there is a 'crying' need *now*. The purpose of adopting this curtailed capital improvement program is a matter of utter necessity, because it is impossible for the Sewerage & Water Board, or the City of New Orleans, to secure $182,000,000.00, with which to carry out a complete program to serve the City for the next twenty years.

"Defendant, in the last three years, expended $174,000.00, in plaintiff's area, solely and only for sewerage service. Two new sewerage pumping stations were installed. These stations were absolutely necessary to carry off the sewerage. A new force-main was installed to connect the two sewerage stations to the force-main that was installed in the year 1930. Seven different sewerage projects were completed in Metairie Park Subdivision, as shown by Drawing No. 5603-E-7 of the Sewerage & Water Board, identified as Exhibit 'Sewerage & Water Board I.' Seventy-six to ninety-eight percent of the property owners in the projects involved, contributed either $5.00 or $2.00 per front foot, according to the nature of the property owned by them, towards the cost of these installations.

"Plaintiff was given the opportunity to secure approximately eighty per cent of the property owners, but failed. Her testimony indicates that not more than ten per cent was secured by her, which did not meet the requirements of the rule of the Sewerage & Water Board. That rule was adopted in utter desperation, in an attempt to give as much service as possible to the outlying sections of the City. Defendant will give plaintiff relief if she can secure voluntary contributions of approximately eighty percent of the property owners intervening between her lots and the nearest sewer main, the same treatment given all property owners in fringe or outlying areas.

"The City as a corporation, has control over the public places and highways within its bounds, and it is the province of the corporation, and not a judicial tribunal, to determine wha improve-

ments shall be made in the streets and canals of the City. Certain Inhabitants of Melpomene Street v. City of New Orleans, 14 La. Ann. 452 (May 1859). (Cited in Hoyle v. New Orleans City R. Co., 23 La. Ann. 537; Carondelet Canal & Navigation Co. v. City of New Orleans, 38 La. Ann. 310; City of New Orleans v. Steinhardt, 52 La. Ann. 1047, 27 South. 586; Brennan v. Sewerage & Water Board, 108 La. 583, 32 South 563.)

". . . .

"Considerable latitude must be allowed the lawmaking power in regulating private affairs, and, if the regulation operates uniformly upon all persons similarly situated and it is not shown that it is clearly unreasonable and arbitrary, the regulation cannot be judicially declared to be in contravention of constitutional right. Breard v. City of Alexandria, 69 F. Supp. 722.

"The cases of State ex rel. Mr. and Mrs. August V. Bailey versus Sewerage & Water Board of New Orleans, and State ex rel Anthony V. Lanasa versus Sewerage & Water Board of New Orleans, recently decided by the Court of Appeal, do not apply in this case. In those cases, the sewerage line was located in front of the property of the plaintiffs. The Court of Appeal held that under the provisions of Revised Statute 33:4090, Sewerage & Water Board is compelled to make the connection free of cost. In the instant case, the nearest sewer main to plaintiff's property is 1900 fee away.

"Courts will not order a public officer or board to perform a duty entrusted to it or him unless:

"(1) It is strictly ministerial and devoid of judgment or discretion; or,

"(2) The duty involves the exercise of judgment or discretion, and the exercise is discriminatory or capricious.

"Since the duty of the defendant is not ministerial, and its refusal or failure to give plaintiff the relief she demands is not discriminatory or arbitrary, plaintiff's demand for a mandatory injunction must be denied."

For the reason assigned, the judgment appealed from is affirmed.

AFFIRMED

1. "All *connections* with the sewerage and water mains shall be made at the cost of the board from the mains to the edge of the foundations of the buildings on the property line, or if there are no foundations on the property line, then the property line itself, and from that point on, they shall be made at the cost and expense of the owner of the property.

"Each owner may contract for the putting in of all connections with which he is chargeable, but all such work shall be done under the rules and regulations, and subject to the inspection and control of the board. The board shall take separate bids from contractors for making a property holder's connections, leaving to each property holders the right to require the work in his premises to be done by the contractor at the bid rice, or to employ some one else for that purpose."

2. "The *extension* of the sewerage, water and drainage systems shall be made, as far as practicable, in areas

adjacent to inhabited portions of the city, divided into squares and lots, and where dedicated streets are open and in use as such, or wherever hereafter opened, dedicated and in use (Emphasis supplied) R.S. 33:4092.

SUPREME COURT OF LOUISIANA

New Orleans

BY HAMITER, J. : **March 23, 1959**

State of Louisiana ex rel.
Florence M. Holifield

v. **No. 44,506**

Sewerage and Water Board
of New Orleans

In re: State of Louisiana ex rel. Florence M. Holifield applying for certiorari or writ of review to the Court of Appeal, Parish of Orleans

---

Writ refused.

We find no error of law in the judgment complained of.

s JBF
s JBH
s ALP
s FWH
s EHMcC
s JDS
s WBH

A TRUE COPY
Clerk's Office, New Orleans
March 23, 1959

Clerk

APPENDIX B

Constitution of the United States of America

* * *

ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal of the laws.

APPENDIX C

Constitution of the State of Louisiana of 1921

* * *

Article 14, Section 23. New Orleans; special acts ratified:

Section 23. The special tax for public improvements, voted by the property taxpayers of the City of New Orleans, on June 6, 1899, and levied by the City Council by Ordinance No. 15,391, approved June 22, 1899, is hereby ratified, and its validity shall never be questioned. The special act adopted by the Legislature at the special session held on August 8, 1899, constituting the Sewerage and Water Board of the City of New Orleans, authorizing the City of New Orleans to issue bonds and providing the means to pay the principal and interest thereof, and for other purposes cognate to the purposes of the special tax aforesaid, is hereby ratified and approved, specially including therein reserved legislative right to amend the same; with the exception that in fixing the rates to be charged private consumers of water, taken from the public water supply of the City of New Orleans, the Sewerage and Water shall base said rates so as to provide for the m ntenance and operation of the said water system and .e public and private supply therefrom, and the cost of maintenance and operation of the public sewerage system; and the City of New Orleans shall be hereafter relieved of the duty of providing in its annual budget of otherwise for the maintenance and operation of the sewerage and water systems; and the said board shall be authorized to use the collections from water rates charged to private consumers for the

maintenance and operation of the public water system, and the public and private supply therefrom, and the cost of maintenance and operation of the public sewerage system, and the creation of a sinking fund for an ultimate renewal of said systems; and any surplus existing, after providing for the uses aforesaid, may be used for the maintenance and operation of the public drainage system; provided, that the rates charged private consumers shall never exceed the total rates charged private consumers by the Sewerage and Water Board, in force November 1, 1913, unless otherwise authorized by the Legislature, provided, the water rates shall never exceed the cost of operating and maintaining the water, sewerage and drainage systems, and all extensions, replacements, repairs and betterments.

The Sewerage and Water Board is authorized to contract with parties having franchises for that purpose to supply water to consumers in the adjoining parishes, at rates to be fixed by the Sewerage and Water Board.

The provision of Act 19 of 1906, and of Act 116 of 1908, relating to the issuance by the City of New Orleans of new public improvement bonds to the extent of eight million dollars ($8,000,000.00), are also ratified and approved, and the respective amendments to the Constitution carrying same into effect are reaffirmed.

Article 23.1 New Orleans; sewerage, water and drainage system; special tax; disbursements;

Section 23.1 It shall be the duty of the Commission Council of the City of New Orleans or its successor, as the governing body of said City of New Orleans, to levy and collect for the year 1942, and annually thereafter for a term of fifty years, a special ad valorem tax of two (2) mills on the dollar upon all the taxable property, real, personal and mixed, in the City of New Orleans; said tax to be levied over and above all other taxes now authorized to be levied by the City of New Orleans. The proceeds of said special tax shall be paid over to the Board of Liquidation, City Debt, day by day as the same is collected by the proper officials of the City of New Orleans, and such proceeds shall be used solely and exclusively for the construction and extension of the sewerage, water and drainage system of the City of New Orleans and shall be deposited with the fiscal agent banks of the Board of Liquidation, City Debt, to the credit of a special fund called Construction and Extension Fund of the Sewerage and Water Board.

All the provisions, conditions and limitations contained in Act No. 6 of the Extra Session of the them General assembly of the State of Louisiana for the year 1899, and all laws amendatory thereof, affecting the use and expenditure of the residue or surplus remaining in the Public Improvement Fund shall apply to the use and expenditure of the proceeds of the said two (2) mills tax to be levied and collected under this amendment.

All disbursements made by the Sewerage and Water

Board out of the proceeds of said fund shall be in the form of warrants or drafts on the Board of Liquidation, City Debt, setting forth the amount thereof, the persons to whom payable, and the purpose for which the payment is made; and the Board of Liquidation, City Debt, is charged with the duty of taking care that no irregular or improper or unlawful payments are made out of said special tax fund. The Board of Liquidation, City Debt, as now organized and created, and with the powers, duties and functions prescribed by existing laws and by this amendment, shall be continued as long as said special tax is levied and collected under this amendment.

The provisions hereof are self-operative and the City of New Orleans and the several board and bodies herein referred to shall carry the same into effect.

Miscellaneous Amendments to Constitution of 1898.

Ratifying Special Taxes for Sewerage and Water Board, City of New Orleans, and the Act of Legislature Authorizing Issuance of Bonds
Acts 1899, Ex. Sess., No. 4., adopted April 17, 1900

The special tax for public improvements, voted by the property taxpayers of the City of New Orleans on June 6, 1899, and levied by the City Council, by Ordinance No. 15,391 approved June 22, 1899, is hereby ratified, and its validity shall never be questions. The special Act adopted

by the Legislature at the special session held on August 8, 1899, constitution the Sewerage and Water Board of the City of New Orleans, authorizing the City of New Orleans to issue bonds, and providing the means to pay the principal and interest thereof, and for other purposes cognate to the purposes of the special tax aforesaid, it hereby ratified and approved, specially including therein reserved legislative rights to amend the same; and all provisions of the present Constitution in conflict with the provisions of said Act, and with this amendment, are to that extent, and that purose only, repealed.

ACT NO. 6, Extra Session of the General Assembly o 1899.

To make effective the vote and levy of the special tax by the property taxpayers of the city of New Orleans for water, sewerage and drainage purposes by authorizing the capitalization of said tax by the issuance of fifty year bond with certain privileges and restrictions, providing for the payment of the principal and interest thereof, for the disposition of the said bonds and the proceeds thereof, and defining the powers and duties of the Board of Liquidation with reference thereto, by constituting and establishing a Sewerage and Water Board for the city of New Orleans, and defining its powers, duties, rights and obligations with reference to the public, the City Council, the Board of Liquidation, and the Drainage Commission, and vice versa; by authorizing the city of New Orleans, through said board, to acquire all necessary property rights and

franchises by purchase, construction or expropriation, either within or without the city, necessary and proper for her public systems of sewerage and water and in such case to assume as part of the purchase price existing mortgages on said property, and to provide for the payment of the principal and interest of such assumed debts; and to provide for the violation of said act.

* * *

2. To the construction throughout the city, inclusive of the Fifth District, of a free sewerage system, with free water therefor, the title whereof shall be in the city.

* * *

Section 33. Be it further enacted, etc., That the contracts for the above works shall be let in such a manner as to cover the whole city, the Fifth District included, at the same time, and shall be prosecuted in such a manner that they shall be completed throughout the city, the Fifth District included, as far as possible at the same time.

The word "whole city" as used in this section shall not be construed to mean the whole parish of Orleans, but to mean, as understood by the voters who voted this special tax, that inhabited portions of the city now divided into squares and lots where the streets are opened and in use as such, or whenever hereafter opened and in use.

ACT NO. 111, General Assembly of 1902.

To amend and re-enact Section 8, 10, 11, 12, 13, 14,

15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, and 36 of Act No. 6, extra session of the General Assembly of Louisiana, approved August 18, 1899, entitled "An Act to * * *; by constituting and establishing a Sewerage and Water Board for the City of New Orleans and defining its powers, duties, rights and obligation with reference to the public, the City Council, * * *

* * * *

Section 33. Be it further enacted, etc., That the contracts for the sewerage and water systems shall be let in such a manner as to cover the whole city, the Fifth District included, at the same time, and shall be prosecuted in such a manner that they shall be completed throughout the city, the Fifth District included, as far as possible at the same time.

The words "whole city" as used in this section, shall not be construed to mean the whole parish of Orleans, but to mean, as understood by the voters who voted this special tax, that inhabited portions of the city now divided into squares and lots where the streets are opened and in use as such, or whenever hereafter opened and in use.

ACT NO. 262, General Assembly of 1952.

To amend and re-enact Sections 4078, 4081, 4082, 4083, 4084, 4085, 4089 and adding a section to be known as Section 4092 of Title 33, Chapter 9, of the Louisiana Revised Statutes of 1950, relative to the creation and organization of the Sewerage and Water Board of the City of New

Orleans, formerly Sections 17, 20, 21, 22, 23, 24, 29 and 33 of Act 6 of 1899, Extra Session of Louisiana Legislature, as amended, entitled * * *

Section 8. That Section 4092 be added to Title 33, Chapter 9, of the Louisiana Revised Statutes of 1950, which said new section was formerly Section 33 of Act 6 of 1899, Extra Session, as amended, is hereby adopted to read as follows:

Section 4092. The extension of the sewerage, water and drainage systems shall be made, as far as practicable, in areas adjacent to inhabited portions of the city, divided into squares and lots, and where dedicated streets are open and in use as such, or wherever here after opened, dedicated and in use.

ACT NO. 2, Extraordinary Session of 1950.

To revise the laws of the State of Louisiana of a general or public nature and to consolidate them into a system of laws to be known as the Louisiana Revised Statutes of 1950; to enact the necessary legislation in connection therewith; to provide for the continous revision of the laws; and to repeal certain enumerated statutes.

Section 1. Be it enacted by the Legislature of Louisiana, That the Louisiana Revised Statutes of 1950 as hereinafter set forth are hereby adopted and enacted into law: * * *